88-1587

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No. 88-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BOBBY REED MAGBY,

Petitioner-Appellant

vs.

DONALD WAWRZASZEK, and
ATTORNEY GENERAL OF THE
STATE OF ARIZONA,

Respondents-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Were the statements made by Magby to his probation officer while he was in custody involuntary?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court's dismissal of petitioner-appellant's writ of habeas corpus filed pursuant to 28 U.S.C. §2254 is attached heretofore as "Appendix 1".

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was rendered on December 5, 1988, and the mandate was issued on January 3, 1989. No motion for rehearing was filed in the United States Court of Appeals, however this petition is filed within the sixty days from the United States Court of Appeals' affirmation of the District Court's dismissal of petitioner's Writ of Habeas Corpus, filed on December 5, 1988. The District Court had jurisdiction over petitioner's Writ of Habeas Corpus under 28 U.S.C. §2254. The United States Court of Appeals had jurisdiction under 28 U.S.C. §2253. This Court has jurisdiction of this matter under 28 U.S.C. §§1254(1) and (2) and §§1257(2) and (3). Jurisdiction is further based on Rule 19(1)(b), Supreme Court Rules, because the United States Court of Appeals, District Court of Arizona, and the Arizona Supreme Court, "Have decided a federal question in a way which conflicts with applicable decisions of this court."

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall any state deprive any person of life, liberty or property, without due process of law:...

STATEMENT OF THE CASE

Bobby Reed Magby files this Writ of Certiorari from an affirmance in the form of a Memorandum Opinion issued by the United States Court of Appeals for the Ninth Circuit affirming the United States District Court of Arizona's judgment denying Magby's Petition for Writ of Habeas Corpus. Magby was convicted in an Arizona state court of murder in the first degree and was sentenced to life imprisonment with no possibility of parole for twenty-five years. On appeal to the Arizona Supreme Court, his conviction was affirmed. State v. Magby, 113 Ariz. 345, 554 P.2d 1272 (1976). In affirming the conviction, the Arizona Supreme Court held that statements made to Magby's probation officer without the benefit of Miranda warnings on a fresh charge

were improper and erroneous. The Arizona Supreme Court held the error to be harmless, and denied Magby's Motion for Rehearing. Magby subsequently filed for federal habeas corpus relief from his conviction, alleging that the error was not harmless, but harmful. The Federal District Court denied that petition, and it was affirmed by the United States Court of Appeals for the Ninth Circuit upon a finding that, although it was a violation of Miranda for the probation officer to question Magby without advising him of his rights, the introduction of Magby's statements at his trial constituted harmless error. Magby v. Moran, 605 F.2d 562 (9th Cir. 1979) (unpublished memorandum). A Petition for Rehearing was denied by the United States Court of Appeals for the Ninth Circuit on September 13, 1979, and on January 7, 1980, a Petition for Writ of Certiorari from the United States Supreme Court was denied.

Magby then filed a new Petition for Post Conviction Relief with the Arizona state court, in which he claimed that his statements to the probation officer were made involuntarily. The Arizona court perceived the issue as to Magby's statements as being identical to that issue raised on Magby's original appeal, and denied relief. That denial was appealed to the Arizona Supreme Court, which denied review without comment on March 31, 1981 (No. 3112-2-PC).

Magby then filed another habeas corpus petition with the Federal District Court in Arizona. The District Court determined that Magby's involuntariness claim was procedurally barred, but a panel of this Court reversed and remanded for reconsideration of the voluntariness claim, in light of the then recent decision in Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). Magby v. Wawrzaszek, 741 F.2d 240 (9th Cir. 1984). The District Court of Arizona referred the matter to a magistrate, who, after several years of deliberation, concluded that Magby's statement to the probation officer was made voluntarily. The District Court adopted the Magistrate's conclusions, and dismissed the petition on September 29, 1987. Magby then appealed that judgment in a timely fashion to the United States Court of Appeals for the Ninth Circuit. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's denial of Magby's Writ of Habeas Corpus in the form of a memorandum opinion dated December 5, 1988, No. 87-2856, CIV 83-728 PHX-WPC. The mandate was issued on January 3, 1989

The original issues presented to the District Court on Magby's second Petition for Writ of Habeas Corpus were as follows:

1. Statements made by Magby to his probation officer while he was in custody were involuntary.

2. An involuntary confession made by Magby to his probation officer while he was in custody was not harmless error.

Subsequently, on the second Petition for Habeas Corpus, the respondent raised the issue of the law of the case, and petitioner also argued in a reply brief in his third argument that the law of the case doctrine does not apply to the case at bar. The Ninth Circuit Court of Appeals chose not to deal with the arguments regarding harmless error and the law of the case, but, based on its own acclaimed de novo consideration, reviewed the District's Court dismissal, and decided only the issue as to whether Magby's statements while made in custody were involuntary. The United States Court of Appeals for the Ninth Circuit confronted the issue of involuntariness directly, and decided that Magby's statements were, in fact, voluntary, notwithstanding that he was in custody.

Statement of the Facts

On Saturday, December 22, 1973, Magby was drinking with some friends, including Danny Clay. A fight broke out between Magby and Clay, and Magby was knocked down and kicked. A friend who witnessed the fight escorted Magby to his nearby van to recuperate. After remaining in the van for only a few moments, Magby returned to the scene of the fight and killed his assailant

Clay with a shotgun which he had obtained from the van.

The police arrested Magby, charged him with committing first degree murder, and confined him in the Pima County Jail. It was readily acknowledged that Magby was a chronic alcoholic, and had been drinking for several months prior to December 22, 1973. As testified by a state expert, his blood alcohol at the time of the shooting was between 0.38 and 0.42. (RT, V. 9, p. 1637). Testimony also revealed that Magby was suffering from a chronic brain syndrome, and was considered by the state psychiatrist to be a person suffering from chronic, depressive neurosis. (RT, V. 11, pp. 2062-2145, 2071). A second state psychiatrist considered Magby to be a chronic alcoholic. (RT, 9/25/74, p. 63). A defense psychiatrist testified that Magby was a chronic undifferentiated schizophrenic. (RT, V. 10, p. 1752).

At the time Magby was arrested he was roughed up considerably by the police (photograph Exhibit D presented at the District Court evidentiary hearing), and ultimately transported to a local hospital and treated for his wounds and intoxication.

Prior to being incarcerated at the Pima County Jail, Magby was taken to a local police station for questioning, where he invoked his Miranda rights and requested an attorney. (RT, V. 3, p. 497; RT, V. 11, p. 144; evidentiary hearing pp.

31-32). Magby also asked to speak with the same attorney he had on the probation sentence, prior to speaking with his probation officer, John Burch.

On the following day, Magby appeared in state court, and was appointed a public defender. (EH, p. 10) (evidentiary hearing Exhibit F). On this same Sunday, December 23, 1973, John Burch read about the shooting in the newspaper. Burch was the probation officer assigned to Magby after Magby had earlier been convicted of obstructing justice. He visited Magby in order to investigate the circumstances of the shooting, and to consider possible revocation of Magby's probation. Magby asserts that Burch sought him out to obtain an incriminating statement so that he could, as he did a few days later in this case, report the information to the prosecuting attorney on the murder charge.

At the time Magby was sentenced on the obstruction of justice charge, he was advised by the sentencing judge that he was to cooperate with his probation officer, or his probation would be violated, thus, allowing for an incarceration of approximately eleven months. This cooperation entailed carrying out the instructions and orders of the probation officer, pursuant to the probation agreement signed by Magby.

Burch arrived at the Pima County Jail and spoke with Magby on Monday, December 24, 1973, approximately 42 hours after Magby's arrest. The

Ninth Circuit Court of Appeals has characterized the initial contact between Magby and Burch as follows:

> When Magby entered the room with Burch, he initiated the conversation about the murder by saying, 'I have really blown it now.' Burch then asked Magby to explain to him what happened, 'If you would.'

Magby has objected to this characterization of the facts, as they are not borne out by the transcripts.

At a competency hearing before trial, upon questioning by the prosecution, Burch indicated that he was, in fact, the person who initiated the conversation with Magby. (CH, p. 135). Again at trial, Burch indicated, "I initially started off the conversation." (11/19/75, p. 182). On a motion to suppress the statements of Burch, upon questioning by the prosecution Burch indicated that after Magby made the statements, "Well, I have really blown it now," Burch asked him additional questions as to what happened, what was his part in it, and asked him to recall what he had experienced or what happened, his part in the arrest, and what led up to the arrest. (V. 3, p. 479). Burch questioned Magby for the next hour, and Magby gave Burch a full confession to the murder. Three days later Burch turned this information over to the county prosecutor, who used it as part of his case-in-chief against Magby. He also provided the information to a psychiatrist, who testified to Magby's sanity at the time of the offense. Burch

did not advise Magby of his Miranda rights, and obtained the statement solely because of his official relationship with his probationer. Burch contacted only the county attorney on the murder charge, but did not contact the prosecutor assigned to the probation case. He continued to visit Magby at the county jail, continued to obtain incriminating statements, and continued to furnish the information to the prosecutor on the murder charge. (RT, V. 3, p. 496).

Burch did not take any notes or tape record any conversations with Magby on December 24, 1973. (RT, V. 11-1975, p. 198). Burch indicated that he had an extremely close, friendly, and trusting relationship with Magby, notwithstanding he considered his role in questioning Magby on the murder charge as one of an adversary. (RT, V. 3, p. 483). Burch never told Magby he intended to inform the murder prosecutor of incriminating statements made by Magby. Burch went to see Magby at the jail because, as he indicated, "I just wanted to see him". (CH, p. 135). Burch admitted that he initiated the conversations, and attempted to ingratiate himself upon Magby as if he were a friend, so that Magby would talk "freely" about the new murder charge. (RT, V. 3, p. 79; CH, p. 40)

Magby feared that Burch would cause his probation to be violated, and have him incarcerated as a result of the violation. Magby also

feared a "no bond" situation on the violation, which would necessitate his incarceration regardless of the disposition of the murder charge. (EH, p. 24). Magby did not testify at his trial, but did testify at an evidentiary hearing in the federal court, that he felt compelled to talk to Burch, because it was required as a part of his conditions of probation. (EH, 1/14/87, p. 27). He also stated that, had Burch advised him of his constitutional right to have an attorney present, and whatever he said would be used against him on the murder charge, he would not have spoken to Burch.

Magby did not believe that he had the same constitutional rights relative to speaking to Burch that applied to police officers. (EH, p. 50). He was unaware that he could invoke his rights and have an attorney present when he spoke to Burch, which was compounded by Burch's failure to advise Magby of his Miranda rights. Magby had no idea that Burch was going to use these statements to incriminate him on the murder charge. (RT, V. 3, p. 500).

Burch never filed any papers to suggest a violation of probation, and his interrogation was simply a subterfuge for the state, made after Magby had invoked his Miranda rights to police officers on December 22, 1973. (RT, V. 3, p. 496). Burch, however, did indicate that when he spoke to Magby no one else was present. (CH, p. 135). Although Magby had a public defender appointed

to him on December 23rd, one day prior to Burch's visit, Magby still believed he was required to follow the sentencing judge's instructions, which included an order to cooperate with and follow the directions of Burch, and to contact the probation officer upon any contact with a law enforcement officer. (EH, p. 7) (evidentiary hearing Exhibit C). Magby spoke to Burch because he feared his probation would be violated (EH, p. 19), feared that he would be held on a "no bond" situation if he did not talk to Burch, and also feared incarceration for contempt if he did not follow the court's orders in speaking with Burch. (EH, pp. 13, 22). Burch never informed Magby that he would have immunity as to his statements on the first degree murder charge if he cooperated with Burch and gave him a full confession. (EH, p. 24).

Magby testified that he was much more concerned about the violation of probation, because it was that charge that held him in custody. (EH, pp. 46-47). He testified that he had previously been violated when placed upon probation in 1969, because he refused to talk and answer the questions of his probation officer. On that case he was immediately sent to the Arizona State Prison. (EH, pp. 56-57). Magby expressed that he had a legitimate fear concerning a refusal to talk to Burch, that he would again have to do further incarceration. His statements were used throughout the trial to indicate that he was

untruthful and was fabricating his defenses of self-defense, intoxication and insanity.

The Ninth Circuit Court of Appeals opinion considered the sole question whether Magby's failure to receive his Miranda warnings, the fact that he was in custody and his statements were made to his probation officer, were such that his statements were involuntarily made and improperly introduced into evidence in violation of his Fifth and Fourteenth Amendment United States Constitutional rights.

STANDARD OF REVIEW

United States District Court for the Ninth Circuit Court of Appeals indicated that they were reviewing the District Court's dismissal of petitioner's Writ of Habeas Corpus de novo. Weygandt v. Ducharme, 774 F.2d 1491 (9th Cir. 1985). The court further stated, in reviewing the issue of voluntariness of a confession de novo, the court would give proper deference to the conclusions of fact of the state court. Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). The state courts of Arizona ruled that the statements made by Magby to Burch were made in violation of his Miranda rights. Further, the state courts of Arizona, without comment or factual conclusions, ruled that the statements made by Magby to Burch were voluntary. The Ninth Circuit Court of Appeals, recognizing that there were no formal

statements of fact or conclusions of law on the voluntariness question, nevertheless held that the Arizona state courts had, in fact, decided the involuntariness question. Since the Ninth Circuit Court of Appeals has made a de novo finding, petitioner requests this Honorable Court reverse the Ninth Circuit Court of Appeals, and declare the statements involuntary.

REASON FOR GRANTING THE WRIT

STATEMENTS MADE BY MAGBY TO HIS PROBATION OFFICER WHILE HE WAS IN CUSTODY WERE INVOLUNTARY.

The statements made by Magby to his probation officer while he was in custody on a murder charge were involuntary and a violation of his due process rights and self-incrimination rights pursuant to the Fourteenth and Fifteenth Amendments to the United States Constitution. The Ninth Circuit Court of Appeals has indicated that for Magby to show that his confession was involuntary, he must demonstrate that it was a result of some coercion by Burch or coercion inherent in the circumstances of the interrogation. The Ninth Circuit Court of Appeals held that Magby confessed "freely and voluntarily". The Court's reasoning was based on the fact that it was believed that Magby had initiated the conversation with Burch by mentioning the murder when he said, "I have really blown it now". The Court felt that Magby wanted to tell people about the details

of the killing, and since he had told two other people that he had done the killing in self-defense, these were further confessions indicating his willingness to confess. The facts presented at the numerous hearings do not bear out the conclusions of fact indicated by the Court of Appeals. The two cases cited by the Court of Appeals, United States v. Wolf, 813 F.2d 970 (9th Cir. 1987); and Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), do not relate in any way to the facts in the case at bar. They do not involve a probation officer and his probationer, but simply deal with general statements regarding the voluntariness of statements. The only correct statement by the Court of Appeals is that this case must be reviewed in light of this court's decision in Minnesota v. Murphy, supra.

The Ninth Circuit Court of Appeals has relied on the fact that Magby testified that he felt no coercion from Burch, which was indicative of his willingness to freely talk to Burch about the facts of the case. The fact that Magby believed Burch to be his "friend" and someone who "went out of his way to help [him] and tried to do things for [him] and give [him] a lot of leniency" is further indication of the deceit, trickery, unfairness, and abuse of office under which Burch improperly obtained the statement from Magby. It is Magby's contention that this very relationship allowed Burch to obtain a statement that the police

were otherwise not allowed to obtain. The Court of Appeals is further incorrect as to its factual conclusions in that Burch did, in fact, ask Magby what happened, what was his role in the shooting, asked him to recall what he experienced, his feelings or what happened, his part in the arrest, what led up to the arrest, where he had gotten the gun, and other questions that were ultimately provided to the prosecution that led to the conviction of Magby. The Ninth Circuit is incorrect that Burch didn't "press" for answers. Further, the court stated Burch never had to repeat a question. Magby testified, upon questioning by the prosecutor at the evidentiary hearing in federal court, that he had to have numerous questions repeated, particularly as to what Magby thought had happened at the time of the shooting. (EH, p. 42).

Burch decided to visit Magby on his own initiative. He initiated the conversation with Magby, and repeatedly questioned him about the facts of the case. In fact, Burch believed it was his duty to find out the facts of the murder charge, and he was acting at that point in an adversarial role, a fact of which he neglected to inform Magby. Burch believed he had an overriding responsibility to report any information obtained from Magby to the prosecutor who was handling the murder charge, and he continually visited Magby so he could obtain this information. Magby trusted Burch, and did not have any idea

that Burch was talking to him so that he could provide incriminating information to the prosecution on the murder charge. Burch did nothing to portray himself as an adversary to Magby, but, on the other hand, operated as a confidant in successfully obtaining the information from Magby.

Burch knew that Magby would want to talk to him regarding the violation of probation in order to follow the sentencing judge's orders and secure his release, lest he be violated on his probation. Burch used this advantage to subtly, mentally coerce Magby into making a full confession to him. Jones v. Cardwell, 588 F.2d 281 (9th Cir. 1978). It must be noted here that Magby had already been through the same scenario with another probation officer, when he refused to talk to him and found himself immediately thrust into prison. Magby did not want the same circumstance to occur on the case at bar, and, further, he attempted to secure his release. Burch did not advise Magby of his Miranda rights, but simply let Magby ramble on pursuant to Burch's intermittent questions.

Burch had put a probation hold on Magby, and left him with a no bond status on the alleged probation violation. Magby wanted that probation hold lifted so he could have a bond to be released. He was not on a no bond status on the actual murder charge. This was further inducement for Magby to speak with Burch.

Magby had invoked his Constitutional Miranda rights to police officers, did not make statements to them, and had been appointed a public defender the day before Burch visited him. Therefore, when Burch came to visit, Magby had requested an attorney, received an attorney, and had refused to speak to law enforcement officers.

Burch was in a position to obtain from Magby what the law enforcement officers could not legally obtain for themselves. A probation officer must not be used as a "stalking horse for the prosecution". United States v. Consuela-Gonzales, 521 F.2d 277 (9th Cir. 1975). The court, in United States v. Consuela-Gonzales, supra, held that the relationship between probationer and probationee is special, unique, should be kept free from violations of the law, and should not be used to secure evidence improperly, as was in the case at bar.

Burch's failure to advise Magby of his Miranda warnings bears on the involuntariness of Magby's statement to Burch. In United States v. Deaton, 468 F.2d 541 (5th Cir. 1972), the court held:

> A parolee (probationer) is under heavy psychological pressure to answer inquiries made by his parole (probation) officer, perhaps even greater than when the interrogation is by an enforcement officer. (468 F.2d at 554).

Magby wanted to cooperate with Burch, but had no idea of the consequences of his submissiveness. Clearly, the risk in talking to Burch, if Magby had known, was not commensurate with the potential serious consequences inflicted upon him by Burch. At the very least, Magby should have been told from the onset about Burch's intentions before making any statement. Burch used the color of his office to obtain the confession from Magby. The probation officer, as a representative of a neutrally detached court, obtains full facts from a probationer so that a trial judge can make a fair determination of whether a probationer has violated the terms of his probation, not so that the information can then be used against the probationer in a fresh, new charge of first-degree murder. Naturally, if the statements are only permitted on the violation of probation, this would encourage probationers, and people like Magby, to talk willingly with or without Miranda rights to their probation officers, even though it could, somewhere down the line, constitute a violation of probation. However, it defeats and offends the interests of justice to allow Magby's confession to his probation officer to be furnished to the prosecutor for use in the state's case-in-chief on a fresh, new charge of first-degree murder. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

Magby was in no position to refuse to talk to Burch, because he knew that his probation would have been violated. However, if Magby had spoken to an attorney, he would have been advised that if this information were to be provided to the county attorney on the pending murder charge, it was not in Magby's interests to make a statement to Burch. Magby knew that if he did not make a statement to Burch, he would be violated on his probation and placed in jail for eleven months without ever being convicted of the new murder charge. The solution is simply to make petitioner's statements to his probation officer inadmissible and immune from use by the prosecution at a subsequent criminal trial. This solution has already been adopted in Arizona relative to plea agreements and probationary searches.

It is Magby's contention that the background surrounding his custodial status must be presented to this Court so that it can be properly demonstrated that the statements were involuntarily obtained from Magby pursuant to Minnesota v. Murphy, supra.

It was established at trial, and at the subsequent evidentiary hearing in the District Court, that Magby, upon his arrest, was physically assaulted by police officers, which required hospitalization and treatment of wounds. Further, Magby had been drinking heavily and was extremely intoxicated at the time of his arrest.

When Burch visited Magby 42 hours after his arrest, Magby was still suffering from numerous cuts and abrasions, was in poor physical condition, and worse mental condition. He was depressed, crying, emotional, and appeared to be in a state of shock, according to Burch. Burch further stated that Magby was "distraught, upset, messed up, and torn up inside". Subsequently, Magby had psychiatrists testify at his trial that he was suffering from schizophrenia, chronic brain syndrome, and depressive neuroses. Magby was not in a position to make a confession based on rational intellect and free will. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

Quite clearly, Burch should not have been interviewing Magby at all, based on the previous invocation of rights and appointment of the public defender. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Burch's disregard of the advisement of Miranda rights lulled Magby into making a statement to him. This, coupled with Magby's physical and mental state, and the requirements of the sentencing judge on the probation case, all provided the scenario for Burch to improperly and subtly coerce Magby into making a statement to him, rendering the statement involuntary and inadmissible at Magby's trial.

The best evidence of Burch's intentions is demonstrated by his failure to file a violation of probation. The Ninth Circuit Court of Appeals wishes to adopt the premise in establishing voluntariness that Burch simply wanted to find out facts to determine if Magby should be violated on his probation. Clearly, from the full detailed confession discerned and uncovered by Burch in his investigation, there would be no reason why Magby would not be violated on his probation, or at least a violation would have been filed by Burch. However, Burch's real intentions became clear when he did not file a violation of probation, but presented himself to the county attorney's office and related the full confession of Magby on the murder case. Burch also supplied information to psychiatrists who testified and gave opinions about Magby's competency to stand trial and his sanity at the time of the offense on the first-degree murder case. These witnesses testified that Magby was a liar, not that drunk, not insane, and did not act in self-defense. It is interesting to note that the Ninth Circuit Court of Appeals portrayed Burch as a person trying to investigate and proceed on the violation of probation, when, in fact, there is not one solitary fact suggesting that he did any work on the violation of probation. All his investigation/work product pertained solely to the murder charge.

Under this scenario, Magby testified that he was fearful that if he did not cooperate with Burch and give him a statement, he would remain in jail without bond, and he would be incarcerated with additional penal time. He also feared contempt of court for not cooperating because he was under a court order to talk to Burch and tell him the truth. The sentencing judge's orders cannot be used as a subterfuge to obtain a statement from Magby to be used on a charge unrelated to the charge for which Magby was placed on probation.

Burch knew full well Magby's statement would be incriminating, hence his adversary status. Minnesota v. Murphy, supra, indicates that when a petitioner is in custody, there is a "built-in compulsory aura that transcends any voluntariness". Custodial arrest means Magby had no choice but to submit to Burch's will. The Ninth Circuit Court of Appeals decided that Magby made his statement voluntarily to Burch because there were no signs of coercion, and Burch used no deceptive techniques to induce Magby to speak. In fact, it appears that the Ninth Circuit Court of Appeals may even have adopted the respondent's position that Magby confessed because he simply wanted to "get it off his chest". However, the Court has failed to consider the facts in the case at bar and this Court's opinion in Minnesota v. Murphy, supra.

It is not necessary for Burch to physically abuse Magby to obtain the information. Magby has never asserted that Burch was abusive nor exercised even excessive questioning. However, Magby has asserted that once the custodial relationship was established, the questioning by Burch assumed a presumptively coercive character. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Magby did not make his decision to speak with Burch in a manner that was the product of free and deliberate choice. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1153, 89 L.Ed.2d 410 (1986). Magby's prospect of jail or incarceration renders any alleged consent to conditions waiving Fifth Amendment rights involuntary.

Burch used his office and power to obtain Magby's statement. Regardless of Burch's activities, as indicated by the Ninth Circuit Court of Appeals, it is Magby's frame of mind that is of moment. Magby's confession was not made with free will, and was not made knowingly and intelligently. Burch's sham must be recognized by this Court for what it was -- a direct disregard of Magby's Fifth and Fourteenth Amendment rights on the first-degree murder charge. Magby did not wish to create the classic penalty situation by invoking a privilege he was not aware existed. Magby must not be:

> ...required...to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. Minnesota v. Murphy, supra.

Magby testified he had no knowledge he could refuse to talk with Burch.

It is inconceivable that Magby knowingly and intelligently waived any privilege against self-incrimination, when it has never been established Magby was even aware of his right to self-incrimination. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). A custodial arrest is said to convey to the suspect that he has no choice but to submit to the officer's will and confess. Miranda v. Arizona, 384 U.S. at 456-457. Magby was in police custody, and this Court has quite clearly stated in Minnesota v. Murphy, supra:

> A different question would be presented if he [Murphy] had been interviewed by his probation officer while being held in police custody or by the police themselves in a custodial setting.

The Supreme Court in Minnesota v. Murphy, supra, made a distinction of custody regarding the self-execution of the privilege. The court also made a distinction between the probation officer appearing to discuss matters that affect probation and his appearing to elicit information that would incriminate his probationer in a pending or subsequent prosecution. This Court felt that a claim of a Fifth Amendment privilege in response to

questions relating to residential conditions could not rest on the same ground that the answer might be used to incriminate him if the probationer were tried for another crime.

This Court in Minnesota v. Murphy, supra, laid out criteria that would determine whether or not a statement was involuntarily made to a probation or parole officer. First, the state must be able to show that at the time the disclosures were made by Magby, his Constitutional right not to make them had been clearly established. There is nothing in the evidence in this case that would support that fact. Further, it must be shown that Magby had been given sufficient warning about being asked potentially incriminating statements, so that he would have an opportunity to secure legal counsel and reflect on how he might answer the questions. In the case at bar, there is nothing to substantiate that Magby was ever apprised of his Constitutional rights, or made aware that his statements would be potentially incriminating on the first-degree murder charge. His custodial status clearly triggered his Miranda rights, and his relationship with Burch triggered his obligation to speak with Burch.

Since Magby was in custody, it was incumbent upon the prosecution to prove that Magby's statements were voluntary, that he had waived his right against self-incrimination, and that his confession was the product of a rational intellect

and free will. United States v. Pinion, 800 F.2d 976, 980 (9th Cir. 1986). It is clear because of Burch's position he was able to overreach and obtain a statement from Magby, in violation of Magby's due process and self-incrimination Constitutional rights. If a state obtains a statement by improper inducement, the statement cannot be used against a defendant. Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); United States v. Crespo de Llano, 830 F.2d 1532 (9th Cir. 1987).

This Court has indicated that the state of Arizona must also show that the environment was not one which would impede Magby's ability to exercise his Constitutional rights. The environment is depicted by Magby's scenario presented in his brief. He had been drinking for three months, was intoxicated continually, and was a mentally ill, defective person. He had been diagnosed as a depressive neurotic with chronic brain syndrome and a chronic undifferentiated schizophrenic. He had been severely beaten by the police and taken to the hospital, and treated for his injuries. He was suffering from abrasions, depression, crying spells, was messed up, and, according to Burch, Magby had never appeared to be as depressed as when Burch ultimately obtained the confession from him. Surely under this environment Magby was in no position to make a free and voluntary statement to Burch.

It is also incumbent upon the state to show that Burch had no reason to assume that truthful responses would be self-incriminating. However, it is clear that Burch visited Magby to find out what Magby had to say about the murder charge. Burch knew that anything Magby would say would be incriminating. None of the principles favoring voluntariness were established by the state respondent in the case at bar. If there is any question that Burch was not seeking incriminating evidence from Magby when he visited him at the Pima County Jail, it is resolved by Burch's immediate presence in the county attorney's office, spewing forth the details of the killing to the county attorney. The only spewing forth made voluntarily in this case was by Burch to the county attorney, and not Magby to Burch, as indicated by the Ninth Circuit Court of Appeals. If there were any question about Burch's intentions, his repeated visits to Magby and subsequent visits to the county attorney relating any information that Magby gave him completely dispelled his integrity and his intentions to help nail the coffin on Magby's case.

Burch conducted the interview of Magby outside the presence of any witnesses, and did not tape record the interview. Minnesota v. Murphy, supra. Burch did not guard against abuse or trickery, and did not advise Magby of his intentions. Quite clearly, Burch realized that if he taped Magby's statement, Magby would be

disinclined to give him a full confession, as Magby had already invoked his rights with the police officers. Burch also testified that he did not advise Magby of his Miranda rights for the very same reason, which are further indications of his improperness in obtaining Magby's statement, thereby making Magby's statement involuntary.

This Court's statement in Minnesota v. Murphy, supra, regarding a defendant's custody, ripens this factual situation for determination by this Court. Once and for all, probationers and defendants must be aware of their Constitutional rights, and what liabilities and consequences they may receive if they "freely and voluntarily" talk to their probation officer while they are in a custodial situation. This question was left open by this Court in Minnesota v. Murphy, supra, although it has been suggested that the privilege is self-executing in a custodial situation, as in the case at bar. The Ninth Circuit Court of Appeals has carved out its own exception to the custodial status of Magby by indicating that it could not see overt signs of coercion by Burch to trigger the concerns about custodial interrogation suggested in Miranda v. Arizona, supra. As this Court is aware, Murphy in Minnesota v. Murphy, supra, was not under arrest, and was free to leave at the end of the meeting with his parole office. This Court then recognized the custodial exception as applicable to the case at bar, and stated:

> A well known exception to the general rule addresses the problem of confessions obtained from suspects in police custody. Not only is custodial interrogation ordinarily conducted by officers who are acutely aware of the potentially incriminating nature of the disclosure sought, Garner v. United States, supra at 657, but also the custodial setting is thought to contain inherently compelling measures which would work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. Miranda v. Arizona, 384 U.S. at 467. See Schneckloth v. Bustamonte, 412 U.S. 218, 246-247 (1973).

Burch was not interested in determining whether Magby had ingested alcohol as a potential violation of probation. His sole concern was details surrounding the murder charge. These required answers that would incriminate Magby in a later criminal prosecution, directly contrary to Minnesota v. Murphy, supra. It is Magby's contention that since he was in custody it became the burden of the state to show that the statements were not coercive. There is nothing in the record to support anything other than the fact that the statements were, in fact, coercive. Magby was in custody, was mentally deficient, was coming off of an alcoholic withdrawal, was deeply depressed, spoke to Burch in an attempt to secure his release and avoid a probation violation or contempt of court, and had no idea that the statements were going to be used against him on the criminal

charge. All of these factors support the fact that Magby's statement to Burch was involuntary and the state of Arizona never met its burden of proof in showing that the statements were, in act, voluntary. This Court's opinion in Minnesota v. Murphy, supra, obviously was referring to the very situation that has occurred in the case at bar. It is interesting to note that this Court has not had an opportunity to make a decision on a case as described in the Court's footnote in Minnesota v. Murphy. This is that case, and Magby requests that this Court grant his Writ of Certiorari and reverse the Ninth Circuit Court of Appeals opinion declaring Magby's statement to be voluntary, or, in the alternative, grant the Writ of Certiorari and allow Magby to further brief this matter before this Honorable Court.

CONCLUSION

The petitioner respectfully prays this Court for a Writ of Certiorari to be granted to allow for a review of the Constitutional issues that would ultimately provide petitioner with a new trial commensurate with his Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted this 2nd day of February, 1989.

Stanton Bloom

Stanton Bloom
Attorney for
Petitioner-Appellant

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOBBY REED MAGBY, Petitioner-Appellant vs. DONALD WAWRZASZEK, and ATTORNEY GENERAL OF THE STATE OF ARIZONA, Respondents-Appellees	No. 87-2856 CIV 83-728 PHX-WPC MEMORANDUM*

Appeal for the United States District Court
for the District of Arizona
William P. Copple, Senior District Judge, Presiding

Argued and Submitted June 13, 1988
San Francisco, California

Before: Schroeder, Wiggins, Circuit Judges, and Stephens**, District Judge.

PROCEDURAL HISTORY

Magby appeals from a judgment denying his petition for a writ of habeas corpus. This appeal follows a long history through the courts. Magby was convicted in an Arizona State Court of murder in the first degree and was sentenced to

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

life imprisonment with no possibility of parole for 25 years. On appeal to the Arizona Supreme Court, his conviction was affirmed. State v. Magby, 113 Ariz. 345, 554 P.2d 1272 (1976). Magby sought federal habeas corpus relief from his conviction on the grounds that, inter alia, he made statements to his probation officer without receiving Miranda warnings. A federal district court denied the petition for the writ and that denial was affirmed by another panel of this court upon a finding that although it was a violation of Miranda for the probation officer to question Magby without advising him of his rights, the introduction of Magby's statements at his trial constituted harmless error. Magby v. Moran, 605 F.2d 562 (9th Cir.1979) (unpublished memorandum).

Magby then filed a new petition for post-conviction relief with the Arizona State Court in which he claimed that his statements to the probation officer were made involuntarily. The Arizona State Court denied relief and that denial was appealed to the Arizona Supreme Court, which denied review without comment on March 31, 1981 (No. 3112-2-PC). Magby then filed another habeas petition with the federal district court in Arizona. The district court determined that Magby's involuntariness claim was procedurally barred, but a panel of this court reversed and remanded for consideration of the voluntariness claim in light of

the then recent Supreme Court decision in Minnesota v. Murphy, 465 U.S. 420 (1983). Magby v. Wawrzaszek, 741 F.2d 240 (9th Cir.1984). The district court instructed a Magistrate to prepare a Report and Finding which the Magistrate did after reviewing the state court record and after conducting his own evidentiary hearing. The district court accepted the Magistrate's conclusion that Magby's statement to the probation officer were made voluntarily and without coercion and the district court dismissed the petition on September 29, 1987. It is from that judgment that Magby seeks this current appeal. Since we ind that Magby's statements were made voluntarily and were not the product of coercion, the district court's dismissal is affirmed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over petitioner's writ of habeas corpus under 28 U.S.C. 2254. This court has jurisdiction under 28 U.S.C. 2253.

FACTS

On Saturday, December 22, 1973 Magby was drinking with some friends, including Danny Clay. A fight broke out between Magby and Clay, Magby was knocked down and kicked. A friend who witnessed the first escorted him to Magby's nearby van to recuperate. After remaining in the van for only a few moments, Magby returned to

the scene of the fight and killed his assailant, Clay, with a shotgun which he had obtained from the van.

The police arrested Magby and confined him in the Pima County Jail. On Sunday, December 24, 1973, John Burch read about the killing in the newspaper. Burch had become the probation officer assigned to Magby after Magby had earlier been convicted of obstructing justice. Burch visited Magby in order to investigate the circumstances of the killing and to consider possible revocation of Magby's probation.[1]

Burch arrived at the Pima County Jail and spoke with Magby on the morning of Monday, December 24. When Magby entered the room with Burch he initiated the conversation about the murder by saying, "I have really blown it now." Burch then asked Magby to explain to him what had happened, "if you would." Magby proceeded to talk to Burch for the next hour and give a gull confession to the murder. Three days later, Burch turned this information over to the county prosecutor who used it as part of his case against Magby.

---

[1]Magby's briefs imply that Burch went to the jail to speak with Magby with the purpose of eliciting incriminating evidence as to the murder charge. On the contrary, the district court found as a fact that Burch went to speak to Magby relative only to violation of probation. Burch's purposes for going to the jail are irrelevant. The crucial question is whether Burch used coercion to elicit Magby's statements. Minnesota v. Murphy, 420 U.S. at 431.

As noted above, Burch failed to give Magby his Miranda warnings, but a panel of this court has already ruled that the introduction of Magby's statements at his trial was harmless error beyond a reasonable doubt (on two prior occasions, Magby had spontaneously confessed). We now consider whether aside from a failure of Magby to receive his Miranda warnings, the circumstances of his confinement and the relationship with and behavior of his probation officer were such that his statements were involuntarily made and improperly introduced into evidence in violation of his Fifth and Fourteenth Amendment rights.

STANDARD OF REVIEW

We review a district court's dismissal of a writ of habeas corpus de novo. Weygandt v. Ducharme, 774 F.2d 1491, 1492 (9th Cir.1985). We review the issue of voluntariness of a confession de novo while giving proper deference to the conclusions of fact of the state court. Miller v. Fenton, 474 U.S. 104, 117 (1985).

DISCUSSION

"Due process does not bar the use of a confession as evidence unless government officials employed coercive interrogation tactics which rendered the defendant's confession 'involuntary' as a matter of law." U.S. v. Wolf, 813 F.2d 970, 974 (9th Cir.1987); Colorado v. Connelly, 479 U.S. 157, 167 (1986). For Magby to show that his

confession was involuntary, he must demonstrate that it was the result of some coercion by Burch or coercion inherent in the circumstances of the interrogation. The evidence, however, clearly supports a conclusion that Magby confessed freely and voluntarily.

Magby initiated the conversation with Burch by mentioning the murder when he said "I have really blown it now." He proceeded to spew forth the details of the killing. On two prior occasions, once on the telephone to his girlfriend in a conversation overheard by the police and once in front of police officers during the taking of a blood sample, Magby spontaneously confessed to killing the deceased. Magby's willingness to discuss the murder came from his desire to explain the circumstances of the killing and not from coercion.

Magby testified at his evidentiary hearing that he felt no coercion from Burch, but rather thought of Burch as a "friend" and as someone who "went out of his way to help me and try to do things for me and give me a lot of leniency." At no point in the interview did Burch press Magby for answers. Burch never had to repeat a question.

Magby asserts he was not aware that he could refuse to answer Burch's questions because the terms of his probation required Magby to be truthful with Burch. He asserts that although he

was aware of his Miranda rights generally and had twice asserted them in refusing to talk to police and in requesting counsel, he was not aware that his privilege against self-incrimination applied to his conversations with Burch. "We note first that the general obligation to appear and answer questions truthfully did not in itself convert [Magby's] otherwise voluntary statements into compelled ones." Minnesota v. Murphy, 465 U.S. at 427. Furthermore, if Magby "harbor[ed] a belief that his probation might be revoked for exercising the Fifth Amendment privilege, that belief would not have been reasonable." Id. at 438. Thus, Magby's possible misapprehension of his right not to incriminate himself did not convert his uncoerced statements into compelled testimony.

Magby seeks to characterize the nature of the probationer-probation officer relationship as inherently coercive. The Supreme Court rejected that view in Minnesota v. Murphy, but noted that the probationer in that case was not in custody when his probation officer questioned him. The Court said that "[a] different question would be presented if he had been interviewed by his probation officer while being held in police custody...." Id. at 429 n.5. While in custody, Magby was interviewed by his probation officer, but there are no signs of coercion on Burch's part to trigger the concerns about custodial interrogation reflected in

a long series of cases from Miranda v. Arizona, 384 U.S. 436 (1965) to Colorado v. Connelly, 479 U.S. 157. Magby spoke of his own free will, he wanted to explain the circumstances of the killing. Burch used no coercive or deceptive techniques to induce Magby to speak. Therefore, the circumstances in this case do not reveal a coercive custodial interrogation of the type alluded to in the Court's Murphy footnote.

The district court's dismissal is AFFIRMED.

Supreme Court, U.S.
F I L E D
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1587

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BOBBY REED MAGBY,

Petitioner,

-vs-

DONALD WAWRZASZEK, and ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court, once again, refuse to address the renewed voluntariness issue on the merits?

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THERE ARE SEVERAL REASONS WHY THIS COURT SHOULD AGAIN DENY THE WRIT AND AGAIN DECLINE TO ADDRESS THE RENEWED VOLUNTARINESS ISSUE ON THE MERITS.

In his present petition, petitioner asks this Court to find his statements made to his probation officer involuntary -- the sole basis for this instant voluntariness issue is the alleged coercive atmosphere of the probationary setting. This Court has previously declined to address the merits of this voluntariness issue.

Long ago, in 1979, petitioner visited this Court with a similar petition, and this Court denied that petition. See this Court's cause number 79-690, with the denial occurring on January 7, 1980. That petition presented a number of issues, two of which are germane to the current proceeding. See 1979 petition at

pages 11-19. In 1979, petitioner argued that the error of admitting at trial his statements to the probation officer could not be considered harmless -- this "impossibility of harmless error" issue presumed the trial admission of the statements to be error on the sole basis that the probation officer failed to advise petitioner of his constitutional rights.

Petitioner also argued, in 1979, that wholly apart from the lack of a waiving of constitutional rights, the statements were involuntarily made due to the probationary relationship alone (the precise issue raised in the instant writ). Admittedly, the evidentiary hearing held on the federal level does provide a now more detailed factual backdrop; however, the total factual scenario is at odds with the slanted

factual presentation offered by petitioner in the present petition. See the district court's memorandum decision, attached to the instant writ, for a partial presentation of the more objective facts.

In any event, before the merits of the present voluntariness issue should be addressed by this Court (and by the state), petitioner appears to have a couple of hurdles to overcome. First, this Court has already seen fit not to consider this voluntariness issue on the merits. There seems to be nothing to alter this prior disposition -- this Court should again refuse to address the merits.

Second, and perhaps more persuasively, this Court has already seen fit not to consider the issue of an "impossibility of harmless error" on the merits.

Regardless of the precise nature of the error (a violation of the advisement of constitutional rights or statements involuntarily made due solely to the probationary relationship), the error remains harmless based on the other more damaging trial testimony elicited at petitioner's trial.

Because the courts have already concluded that the admission of petitioner's statements was harmless error, even if this Court were to conclude that the statements were involuntary, it would not result in a reversal of petitioner's conviction and thus would result in only a hollow victory. Seemingly, this Court has more pressing matters than to extend the courtesy of a hollow victory. Contrary to petitioner's view in the instant writ, this is not "that case" which this Court

has supposedly been waiting for in order to refine the law of the land.

By design, this response does not set forth an historical background. No factual concessions are intended -- it is respondents' position that a proper presentation of the facts shows that the statements are wholly voluntary. See the memorandum decision attached to petitioner's writ. Respondents submit that, even if petitioner's rendition of the facts is taken as true and the statements could be considered involuntary, any error from the admission of the statements would still be harmless, and thus would not entitle petitioner to relief.

CONCLUSION

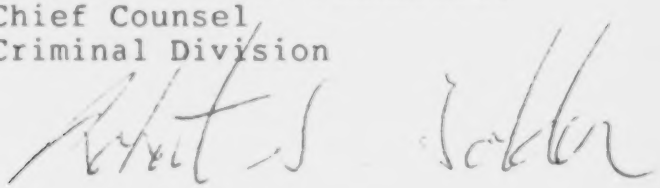
For the foregoing reasons, respondents ask this Court for an order again denying the writ.

DATED this 28th day of April, 1989.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of Arizona

Jessica Gifford Funkhouser
Chief Counsel
Criminal Division



ROBERT S. GOLDEN
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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

THREE COPIES of this Response were mailed this 28th day of April, 1989, to:

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Additionally, THREE COPIES of this Response were mailed to:

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Robert S. Golden

ROBERT S. GOLDEN

SUBSCRIBED AND SWORN to before me this 28th day of April, 1989.

Janet E. Dyer

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

HC5-134/9428d jd

Supreme Court, U.S.
FILED
MAY 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

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No. 88-1587

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BOBBY REED MAGBY,

Petitioner-Appellant

vs.

DONALD WAWRZASZEK, and
ATTORNEY GENERAL OF THE
STATE OF ARIZONA,

Respondents-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Is the involuntariness issue decided by the Ninth Circuit Court of Appeals squarely before the Court for purposes of review?

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ARGUMENT I.

THE INVOLUNTARINESS ISSUE DECIDED BY THE NINTH CIRCUIT COURT OF APPEALS IS SQUARELY BEFORE THE COURT FOR PURPOSES OF REVIEW.

It would appear that the respondent has failed to review the statement of the case as stated in the initial writ papers, and thereby has not presented the true facts to this Court. Respondent, in an apparent confessionary reluctance in its haste and paucity, has intentionally failed to address the issues clearly raised by the Ninth Circuit Court of Appeals and by Magby on his Writ of Certiorari to this Court. Magby has furthered his appellate remedies by squarely dealing with the involuntariness issue of his statements to his probation officer as the sole issue decided by the Ninth Circuit Court of Appeals on December 5, 1988, and as attached in the initial writ

papers as "Appendix 1". In fact, respondent makes absolutely no mention of the Ninth Circuit Court of Appeals opinion in its response. It would appear that respondent has elected not to respond to the involuntariness issue, but, rather, has improperly suggested that the issue is not ripe for consideration by this Court. Respondent has repeatedly taken this position throughout the lower courts, notwithstanding that the Ninth Circuit Court of Appeals in its opinion on the merits of petitioner's argument, has explicitly and/or impliedly rejected respondent's argument.

The statement of the case presented in the initial papers demonstrate that Magby properly preserved the issue of an involuntary statement made to his probation officer at the trial level. The issue was not raised on the original state appeal, but was brought to the

attention of the District Court of Arizona on a Writ of Habeas Corpus to that court in conjunction with several other issues. The District Court stated as a footnote to its opinion:

> The Petition for Writ of Habeas Corpus suggests an issue not raised in the state proceedings. The papers imply that statements made by Magby to a probation officer and to a psychiatrist may have been involuntary. Cf. United States v. Bernett, 495 F.2d 943, 948-49 (D.C. Cir. 1974) (relationship between Miranda and voluntariness issues). Evidentiary use of involuntary admissions contravene the Fifth Amendment, and arguably can never constitute harmless error. See C. Wright, Fed.Prac.Pro.: Criminal §855. Petitioner's reply memorandum disclaims any intent to raise this issue, however. Cf. Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976) (federal court cannot address the merits of any issue until the available state remedies are

> exhausted as to every issue in the petition). Therefore, the court will not assess the procedural or substantive implications of this issue.

It was clear that the District Court of Arizona would not consider the issue of involuntariness of Magby's statements until Magby had exhausted his state remedies. It is this very issue that is now before this Honorable Court which Magby seeks for review.

Magby, in an attempt to expedite the issue, and hopefully resolve the matter without proceeding through the long, cumbersome state route, sought to have the Ninth Circuit Court of Appeals consider this new appellate issue at the same time the Ninth Circuit Court of Appeals was reviewing Magby's other issues raised in his habeas corpus petition. The Ninth Circuit Court of Appeals, without really specifically considering the new issue, affirmed the District

Court, and subsequently this Honorable Court summarily denied Magby's Writ of Certiorari.

Magby, following the advice of the District Court of Arizona, pursued his remedies in state court. He filed a Petition for Post-Conviction Relief, which was denied by the trial court, who affirmed that the issue had been preserved at the trial level. A Petition for Review was filed in the Arizona Supreme Court, and was summarily denied on March 31, 1981.

Magby returned to the District Court of Arizona, raising the involuntariness issue, and requested an evidentiary hearing and oral argument, as he had in the state court, but which he was with exception not afforded. (Magby was afforded oral argument in the state trial court on this issue.) The District Court, although previously encouraging Magby to revisit the court after having exhausted his

state remedies, took a different tack on this occasion, and ruled that Magby had procedurally defaulted, and was barred from seeking review of his claim because he had not really raised the issue at the state trial level. The state trial court, however, contrary to the District Court, clearly indicated the issue had been raised. The District Court acknowledged the state court's position, but nevertheless held that the state ruling had been in error, and that the state court was not knowledgeable in the subject, and did not realize that it had actually not considered the issue at trial. Respondent quickly jumped on this bandwagon, and has continually vigorously pursued the waiver argument, much as it is in this Court.

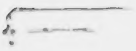
Magby appealed the District Court ruling to the Ninth Circuit Court of Appeals, and, after oral argument, the Ninth Circuit Court of

Appeals overruled the District Court and remanded the case to the District Court of Arizona to now consider the merits of Magby's involuntary statements to his probation officer. Magby v. Wawrzaszek, 741 F.2d 240 (9th Cir. 1984).

Judge Pregerson, on behalf of the Ninth Circuit Court of Appeals, stated:

> We express no opinion on the merits of Magby's involuntariness contention because we think the District Court should address the issue in the first instance. In considering Magby's second petition, the District Court thought Magby had procedurally defaulted. We disagree. In rejecting Magby's second round of post-conviction motions, the Arizona courts found, and our review of the record confirms, that Magby's counsel did raise the involuntariness issue at trial. See, e.g., State v. Magby, No. A-24765, slip op. at 2 (Pima County Super. Ct. Sept. 25, 1974) (Minute Entry denying Motion in Limine):

See also State v. Magby, No. A-24765, slip op. at 1 (Pima County Super. Ct. Dec. 23, 1980) (Minute Entry denying post-conviction relief). Given the particular facts that this case presents, we see no reason to reject the Arizona courts' determination that Magby did, after all, properly raise the issue during the original state court proceedings. Therefore, the District Court should have entertained the involuntariness claim on the merits. We reverse and remand for this purpose. On remand, the District Court should consider Magby's claim in light of the Supreme Court's recent decision in Minnesota v. Murphy, 104 S.Ct. 1136 (1984). Murphy held that a probationer who confesses to a crime during a non-custodial meeting with his probation officer is considered to have done so voluntarily unless he takes the initiative to assert his Fifth Amendment privilege. After Murphy, the privilege is not self-executing, and the parole officer is under no obligation either to remind



> the probationer of the privilege or to administer Miranda warnings. Without expressing an opinion on Murphy's affect, if any, on Magby's case, we note that Magby's probation officer -- unlike the officer in Murphy -- did question the probationer in a custodial setting.

Clearly, the Ninth Circuit Court of Appeals wanted the District Court to afford Magby a full and plenary hearing on the merits, in light of this Court's then recent decision in Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

The District Court of Arizona then conducted an evidentiary hearing (testimony and new exhibits and evidence was received) and permitted oral argument. Magby waited approximately two and a half years for a decision from the District Court of Arizona, which ultimately decided Magby's statements were not involuntarily made to

his probation officer while in custody, and, if they were, they were not harmful to his case.

Magby revisited the Ninth Circuit Court of Appeals, and in his opening brief addressed the involuntariness claim. Respondent then raised the issues of harmless error and the law of the case, which were completely replied to by Magby in a subsequent brief. In fact, extremely lengthy briefs were submitted by Magby on all of these issues, with adequate and supporting law for his position to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals finally, for the first time, confronted the involuntariness issue head on, and decided Magby's statements to his probation officer while in custody were not made involuntarily. The Ninth Circuit Court of Appeals did not address the harmless error issue, or the law of the case argument, but decided only the issue of

involuntariness. It is this issue that Magby seeks review on this writ. The Court of Appeals indicated they were considering the question de novo, as can this Court on review.

Respondent presents no citation of law or authority to this Court for his position, only his conclusionary words that are not borne out by the record and the clear intention of the Ninth Circuit Court of Appeals opinion. It is evident from the present state of the record that the Ninth Circuit Court of Appeals is the first court to address Magby's claim of involuntariness in light of Minnesota v. Murphy, supra. Magby has offered new evidence and exhibits which support his claim that his statements while in custody were involuntarily made to his probation officer. Mincey v. Arizona, 437 U.S. 385, 95 S.Ct. 2408, 37 L.Ed.2d 290 (1978); Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct.

917, 9 L.Ed.2d 922 (1963); Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981); New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979). It has also been held that the doctrine of the law of the case is a voluntary limitation. Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974); United States v. Fullard-Leo, 156 F.2d 756 (9th Cir. 1946); United States v. Imperial Irrigation District, 559 F.2d 509 (9th Cir. 1977); Bryant v. Yellen, 447 U.S. 352, 100 S.Ct. 2232, 65 L.Ed.2d 184 (1980). No court thus far has addressed the harmless nature of the involuntariness of the statements.

The questions heretofore have dealt with the harmless error regarding the Miranda violations. Further, additional arguments not heretofore made to the Arizona Supreme Court regarding the testimony of psychiatrists and the questions on the pretrial hearings regarding competency and on a motion to suppress the statements have now been made available in argument. Further, as indicated, an evidentiary hearing was held wherein Magby, who did not testify at his trial, now testified in the District Court. Therefore, since the law of the case deals with the same court, the same case, and the same issues, and new issues, evidentiary matters, exhibits and arguments have been presented to the District Court, the law of the case is not applicable to the case at bar. Clearly, the United States Court of Appeals of the Ninth Circuit would not have remanded the case to the District Court if it had

concluded that the law of the case made the issue of involuntariness moot. United States v. Robinson, 690 F.2d 869 (11th Cir. 1982). Assuming arguendo the law of the case is applicable, this Court can depart from such legal pronouncements when the circumstances of the case warrant. United States v. Fernandez, 506 F.2d 1200 (2nd Cir. 1974). When a material change in the evidence or relevant circumstances has occurred, the law of the case would not be applicable. United States v. Estrada-Lucas, 651 F.2d 1261 (9th Cir. 1980). In the case at bar, any adherence to the doctrine of the law of the case would clearly work a manifest injustice to Magby. Arizona v. California, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); Cruz-Sanchez v. Rivera-Cordero, 728 F.2d 1531 (1st Cir. 1984).

Respondent, in his concern for paper, has elected not to deal with

the merits of Magby's involuntariness argument and the decision of the Ninth Circuit Court of Appeals. Respondent's refusal to recognize the opinion cannot be countenanced as legal argument, but only legal strategy, and, therefore, those who live by the sword must die by the sword. Magby requests that his statements made to his probation officer while in custody be declared involuntary because of the respondent's failure to address this issue.

Magby is not raising the Miranda issue, as this issue has been decided and considered to be harmless error. However, the involuntariness question has, for the first time, been decided by the United States Court of Appeals for the Ninth Circuit. The harmfulness of the statement need not be reached until this Court has decided that the statements made by Magby to his probation officer while in custody

were involuntary.

Respondent reluctantly admits "that a more detailed factual backdrop" has occurred in the District Court permitting review, but accuses Magby of slanting the evidence. Respondent has not taken the time and effort to enlighten this Court wherein it has disagreement, but presumably desires this Court to ferret out this information. Respondent considers the Ninth Circuit Court's factual conclusions "objective" because it agrees with its position. Magby has specifically addressed all these issues in his opening writ, and truly makes the involuntariness issue ripe for review in this case. Magby has presented the total facts in light of Minnesota v. Murphy, supra. Magby is not aware of any case thus far that has decided the question posed by this Court in Minnesota v. Murphy, supra -- whether Murphy's statements to his probation officer

would have been voluntary if he had been in a custodial situation. This is the precise issue to be decided in this case. Magby asserts that because he was in custody, and because of a previous probationary status, and consequent no-bond status on his potential violation of probation, the trial court requirement to cooperate with the probation officer or face revocation and further incarceration, and many other factors, including, but not limited to, his mental and physical status at the time of the statement, and lack of Miranda rights, this case cries out for review by this Court. The question of whether a statement or confession obtained from a probationer by his probation officer while in custody is involuntary must finally be resolved. While respondent perceives this question and the resolving of this issue favorably to Magby to be a "hollow victory", Magby views it

quite to the contrary. This "pyrrhic" victory would resolve the battle that Magby has valiantly fought through the system for the past 15 years. If the statements are involuntary, they would not be harmless, as argued extensively by Magby in his briefs before the Ninth Circuit Court of Appeals. This Court can declare the statements involuntary, and remand the matter to the Ninth Circuit Court of Appeals for a determination on the harmful error question. In the alternative, this Honorable Court can decide the harmful error issue, sua sponte, after addressing the involuntariness question. (And require further briefing.)

A Magby victory on the involuntariness question may be "hollow" for respondent, but it is filled to capacity with all the ingredients of due process and traditional notions of fair play and justice for Magby. This "hollow victory" is what Magby

has dreamed about in his prison cell for the last 15 years -- an opportunity to right the wrong that allowed improper, unfair, and unconstitutional evidence to be used against him to obtain a conviction.

Respondent's papers are those typically filed by the state in an attempt to avoid having to deal with the merits of the writ and the Court of Appeals opinion. Magby could not assail the Court of Appeals opinion on harmful error because it never considered this issue. Respondent has elected to make a vague sound of arguing harmful error without any support in law and fact. Respondent has suggested that, if this Court will not accept its vagaries, then it will be forced to address the merits. Respondent is not the screening authority in this forum, and, if it chooses to forego argument on the merits, it must be considered waived. The "no factual concessions" by design is only one

of the many caveats and exemptions claimed by respondent for its inadequate response. Respondent has had ample time in which to address the arguments posed, particularly since it received Magby's writ on February 3, 1989.

CONCLUSION

Magby humbly requests this Honorable Court declare his statements to his probation officer while in custody involuntary, and remand this matter to the Ninth Circuit Court of Appeals on the issue of harmful error, or, in the alternative, declare the statements involuntary and harmful, and grant Magby's writ allowing for a new trial.

Respectfully submitted this 16th day of May, 1989.

Stanton Bloom
Attorney for
Petitioner-Appellant

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

STANTON BLOOM, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has served two copies of the following documents on the Attorney General, State of Arizona, 200 State Capital Building, Phoenix, Arizona, 85007, and has forwarded by mail, three copies of the following documents to the Solicitor General, Department of Justice, Washington, D.C., on this 16th day of May, 1989.

Stanton Bloom
STANTON BLOOM

SUBSCRIBED and SWORN TO before me this 16th day of May, 1989, by STANTON BLOOM.

Janice L. de la Vina
Notary Public

My Commission Expires: 8-17-90